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California Public Safety Labor Blog

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Court Dismisses POBR Suit Over Denial of Request for Representation in Inspector General's Investigation and Awards State Fees Under Anti-SLAPP statute

Posted: 18 May 2018 09:59 AM PDT

In Blue v. California Office of the Inspector General 2018 WL 2147858, California's Inspector General successfully denied the right of several correctional officers to be represented during interviews conducted as part of an institutional review of High Desert State Prison.

During the summer of 2015, the California Senate Rules Committee issued a letter to the State Inspector General authorizing his office to review the practices at High Desert State Prison. The primary focus of the review was the prisons practices regarding excessive use of force against inmates.

As part of the investigation, five correctional officers—who previously worked at the state prison—were interviewed. Each of the former employees requested representation during each interview. All five of their request were denied. They were told they were not under investigation and nothing said would be used to pursue an investigation, or recommend an investigation be opened. Despite the assurances, several of the officers voiced concern that questions asked at the interview may lead to punitive action for failure to report misconduct.

After the interviews concluded, the five former High Desert State Prison Employees filed suit alleging that the Inspector General violated the Public Safety Officers Bill of Rights ("POBRA") by refusing each employee's request to be represented during the interviews. In response, the Inspector General's Office filed an Ant-SLAPP Motion.

California's Anti-SLAPP statue allows a defendant to move for dismissal of a lawsuit if it can successful argue that the suit was brought in order to deny a person's right to free speech. Specifically, the Act provides that "a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there

is a probability that the plaintiff will prevail on the claim."

In granting the Inspector General's Anti-Slapp Motion, the Appellate Court held that review of High Desert State Prison concerned a topic of widespread public interest and the report issued to the Senate contributes to a public discussion of the topic. The Court also commented that "had the defendants known they would be required to defend against meritless claims arising out of their interviews with the individual correctional officer plaintiffs without the ability to have those claims stricken at an early stage in the proceedings under the anti-SLAPP statute, it is entirely possible they would have conducted the review without interviewing those plaintiffs at all, and thereby would have lost valuable information forming at least part of the basis for a number of the OIG's recommendations regarding policy improvements at High Desert State Prison. Simply put, public discussion of this important issue may well have been chilled."

Finally, the Court stated that "none of [the five officers] had a reasonable basis to believe their interviews with the [Inspector General] could lead to punitive action against them." Thus, there was no basis for invoking POBRA rights. However, the Court failed to address how the act of simply allowing a representative into that meeting would "chill free speech."

This case illustrates the pressing need to amend the Anti-SLAPP statute to exclude public sector labor litigation. The Anti-SLAPP statute was enacted to prevent lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. This case is the latest in a line of cases subjecting public employees and their unions to the threat of significant fee liability when they seek to enforce labor statutes.

POBRA Entitles Peace Officers to Investigation Notes and Source Materials

Posted: 18 May 2018 09:04 AM PDT

A recently published Appellate Court case clarifies that Section 3303 of POBRA requires public employers to disclose original source materials placed within final investigative reports prior to Skelly hearings.

In **James Davis v. County of Fresno,** a supervising juvenile correctional officer was terminated. Prior to his termination, James Davis was served with a Notice of Intent to terminate, as well as, a packet of information containing an Internal Affairs Report and a 2012 Memo. Both the IA report and the 2012 Memo referenced certain attachments. The attachments were not provided to Davis.

On appeal, Davis alleged the County's failure to produce those documents violated his procedural due process rights that apply before his *Skelly* hearing. In addition, Davis alleged the failure to produce the requested documents violated his rights under POBRA, Government Code section 3303 (g), which states a peace officer is entitled to "any reports and complaints."

The court held materials delivered prior to Davis's ***Skelly*** hearing satisfied the requirements of due process applicable *before* disciplinary action was imposed, but that the County violated Davis's right under POBRA to receive "any reports or complaints made by investigators or other persons."

The court analyzed the facts under *Gilbert v. Sunnyvale (2005)*, stating the materials provided to Davis were only required to 1) adequately explain the employer's evidence, and; 2) provide notice of the substance of the evidence so that Davis could adequately respond at the *Skelly*hearing. However, the Court suggested that Davis might have been able to carry his burden by demonstrating how his response at the *Skelly* hearing would be hindered by the absence of the attachments, but David never made this demonstration and the Court held Davis's pre-removal safeguards under due process were not violated.

However, the Court interpreted the term "any reports" to include the incident reports and interview transcripts *attached* to a September 2012 memorandum that was authored/prepared by a special probation investigator. The Court specifically appealed to POBRA's legislative intent that providing officers with a copy of the attachments to an investigative memorandum helps assure the integrity of the report because the officer will be able to check the source documents to determine if they are accurately described in the memorandum. Thus, interpreting the term "report" to include attachments furthers POBRA's purpose of promoting stability, integrity and public confidence in law enforcement.

This case illustrates the importance of serving disciplinary discovery requests under multiple statutory and Constitutional grounds. Generally, public safety union members have due process discovery rights under *Skelly*, the MMBA, and the POBR/FFBOR. Had Davis only requested the information under *Skelly* he would not have prevailed. Discovery of source materials and investigative notes are often critical in refuting the conclusions and summaries contained in disciplinary investigations.

AB 2154 Provides Minimum Paid "Release Time" for Union Activities

Posted: 18 May 2018 08:55 AM PDT

On February 12, 2018, Assembly Member Rob Bonta introduced **AB 2154**. The proposed legislation standardizes and expands "release time" for employees engaging in union activities without loss of compensation. AB 2154 mandates that that an employer provide a "reasonable" number of employees paid time off in order to conduct union activities including: 1) investigating potential or existing grievances; 2) meeting and conferring on matters within the scope of representation; and 3) testifying before public agencies.

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